IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1845

JAMES STRYKER and WALTER WOITOVICH,

Petitioners,

vs.

THE VILLAGE OF OAK PARK, ILLINOIS and BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK PARK, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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THE VILLAGE OF OAK PARK, ILLINOIS and BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK PARK, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners, James Stryker and Walter Woitovich, respectfully pray that a Writ of Certiorari issue to review the judgment entered by the Supreme Court of Illinois on January 26, 1976, Docket No. 47635, denying the petitioners the protection afforded under the Fire and Police Commissioners Act of the State of Illinois relating to the procedural scheme for appointing, promoting, suspending and discharging Illinois police officers and the selecting of members to Boards of Fire and Police Commissions of the State of Illinois (pertinent portions of said act are reprinted in the appendix at A-51); a petition for rehearing was denied by the Supreme Court of the State of Illinois on March 25, 1976.

OPINIONS BELOW

On January 26, 1975, the Circuit Court of Cook County, Chicago, Illinois, entered a judgment against the petitioners and for the respondents sustaining the respondents' position that, under home rule powers of the State of Illinois, the Village of Oak Park had the right to modify the Fire and Police Commissioners Act of the State of Illinois by creating the position for three Deputy Chiefs of Police and subjecting them and the Chief of Police to appointment, suspension or discharge by the Village Manager, eliminating the rank of Captain and abolishing the requirement that members of a Board of Fire and Police Commissioners should not hold a lucrative position in a governmental body and that such commission be composed of at least one member of the opposite political party.

On June 17, 1975, the Supreme Court of Illinois granted the petitioners a motion to transfer and set for hearing pursuant to written stipulation by the respondents.

On January 26, 1976, the Supreme Court of Illinois sustained the judgment of the Circuit Court of Cook County, Illinois, which opinion, majority and dissenting, is reprinted in the Appendix at page A-1.

On February 13, 1976, the petitioners filed a petition for rehearing which petition is reprinted in the Appendix at page A-15.

On March 25, 19[illegible] the Supreme Court of Illinois denied the petition for rehearing which denial appears at Appendix A-22.

JURISDICTION

1. The judgment of the Supreme Court of Illinois was entered on January 26, 1976 Appendix *infra* A-1.

2. The federal question was raised by petitioners' brief filed with the Supreme Court of Illinois. See Appendix D at pgs. A-37 and A-38; it was further discussed in petitioners' reply. See Appendix E at pgs. A-48-50; it was analyzed in the majority opinion Appendix A *infra* pg. A-5-6 and in the dissenting opinion, pages A-9-14; it was further reviewed in the petitioners' petition for rehearing. (See Appendix B *infra* pgs. A-19-21).

3. The petition for certiorari was filed less than 90 days from the denial of the petition for rehearing on March 25, 1976. The jurisdiction of this Court is invoked in U.S.C. Sec. 1257 Subsec. 3.

QUESTIONS PRESENTED

The petitioners brought suit for declaratory judgment and mandamus in the Circuit Court of Cook County, Chicago, Illinois, challenging the Village of Oak Park's right to amend the Fire and Police Commissioners Act of the State of Illinois.

The question thereby arising is:

Did the Village of Oak Park, under its home rule powers, enact ordinances amending the Fire and Police Commissioners Act of the State of Illinois relating to the appointment, promotion, suspension and discharge of police officers and the selection of members to the Board of Fire and Police Commissioners, in violation of the I, V, IX and XIV Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On, or before, April 15, 1974, Police Officers James Stryker and Walter Woitovich were members of the Village of Oak Park Police Department and governed by the Fire and Police Commissioners Act of the State of Illinois.

On, or before, October 8, 1974, the members of the Oak Park Fire and Police Commission were selected on the basis of the Fire and Police Commissioners Act of the State of Illinois.

That on April 15, 1974, the Village of Oak Park amended its local ordinance Chapter 36, Section 36.1 by creating the position of Chief of Police, three Deputy Chiefs of Police and such other officers and personnel as determined by the President and Board of Trustees. It further abolished the rank of Captain. See Appendix A *infra* pg. A-2.

Amending Chapter 36, Section 36.8 of its local ordinance, it provided that the Village Manager be authorized to appoint, suspend, or discharge a Chief of Police and three Deputy Chiefs of Police.

On October 8, 1974, the Village of Oak Park amended Chapter 2 of its local ordinance by adding Article 16 relating to the Board of Fire and Police Commissioners by abolishing the state law governing the selection of members of the Fire and Police Commission in that it removed the requirements of not holding a lucrative position in a governmental body and having at least one member of the opposition party on its board. See Appendix *infra* pg. A-3.

Upon the passing of the village ordinance amendments as described herein, the petitioners filed their complaint for declaratory judgment and mandamus in the Circuit Court of Cook County, Illinois; both petitioners and respondents filed respective motions for summary judgment with the petitioners praying that the Village of Oak Park's amending ordinances be stricken and the respondents praying the amending ordinances of the Village of Oak Park be sustained; the Circuit Court of Cook County, Chicago, Illinois sustained the respondents' motion for summary judgment; the petitioners petitioned the Supreme Court of Illinois to consider the issues involved on the basis of a motion to transfer to which motion the respondents stipulated; the Supreme Court of Illinois sustained the Circuit Court of Cook County, Chicago, Illinois on January 26, 1976; it further sustained the Circuit Court of Cook County, Chicago, Illinois by denying petitioners' petition for rehearing on March 25, 1976.

REASONS FOR GRANTING THE WRIT

I.

The decision below violates the equal protection clause of the XIVth amendment of the United States Constitution in that the citizenry of the State of Illinois is denied equal protection in that its policemen are not selected on the basis of competency and merit.

In sustaining the decision of the Circuit Court of Cook County, Chicago, Illinois, the Supreme Court of the State of Illinois, in effect, has denied equal protection to the citizenry of the State of Illinois.

Each citizen of the State of Illinois has the right to expect that police officers of the State of Illinois are governed by an orderly scheme of appointment, promotion, suspension and discharge and are selected and governed by impartial Boards of Fire and Police Commissioners for the purpose of providing competent police officers to protect equally each and every citizen of the State of Illinois.

It is ironic that the Supreme Court of the State of Illinois in the *City of Chicago v. Pollution Board*, 59 Ill. 2d 484 (1974) has recognized the principle of the equal protection clause as it pertains to the prevention of pollution.

On page 489 of that opinion, the Court states as follows:

> "We conclude therefore that a local governmental unit may legislate concurrently with the General Assembly on environmental control. However, as expressed by that portion of the constitutional proceedings referred to above, such legislation by a

local governmental unit must conform with the minimum standards established by the legislature.

Therefore, it is the contention of the petitioners that an analogous set of circumstances exists in that the maintaining and upholding of uniform standards for the prevention of pollution are as vital as the maintaining and upholding of uniform standards in the appointing, promoting, suspending and discharging of Illinois policemen and the selecting of board members to Fire and Police Commissions of the State of Illinois which govern the appointing, promoting, suspending and discharging of Illinois policemen.

From the standpoint of the equal protection clause of the XIV Amendment of the United States Constitution, each citizen of the State of Illinois not only has the right to expect, but has the right to demand, that Illinois policemen be selected on the basis of merit. *Kennedy v. City of Joliet*, 380 Ill. 15; *People ex rel. Cadell v. Board of Fire and Police Commissioners*, 345 Ill. App. 415.

II.

The decision below violates the individual rights of Illinois policemen on the basis of the I, V, IX and XIV Amendments of the United States Constitution in that the individual Illinois policeman is not to be appointed and promoted on the basis of merit and, as a deputy chief or police chief, is not to be suspended or discharged by an impartial hearing before an impartial Board of Fire and Police Commissioners.

Relating to the issues of the I, V, IX and XIV Amendments of the United States Constitution, the minority opinion addresses itself to the question of the importance of merit selection as contrasted with the

selection of policemen by the system of political patronage. Appendix A *infra* pg. A-9.

As the minority opinion states, in citing *Kennedy v. City of Joliet*, 380 Ill. 15 and *People ex rel. Cadell v. Board of Fire and Police Commissioners*, 345 Ill. App. 415, the purpose of the Fire and Police Commissioners Act of the State of Illinois is to provide police tenure on the basis of merit in order to encourage the retention of qualified policemen.

Further, whether a policeman is a deputy chief or a police chief, the minority opinion, Appendix A *infra* pg. A-13 stresses the necessity of providing suspension and discharge hearings for such officers.

As the minority asserts in *Bovinette v. City of Mascoutah*, 55 Ill. 2d 129 (1973), only Boards of Fire and Police Commissioners for cause can suspend or discharge policemen including police chiefs upon written charges after a hearing.

At the same time, the minority opinion, Appendix A *infra* pg A-12, emphasizes the need for impartial Boards of Fire and Police Commissioners of the State of Illinois which impartiality is presently provided by the Illinois Fire and Police Commissioners Act in that members of such boards must not hold lucrative municipal positions and that each political party must have representation on such boards.

In *Mank v. Board of Fire and Police Commissioners*, 7 Ill. App. 3d 478, the Court supports the concept as expressed in the minority opinion as to the makeup of Fire and Police Commissions when it states that the purpose of the act is to create a board independent of and free from political and outside influence.

Based upon the observations of the minority opinion, the petitioners filed a petition for rehearing which was denied by the Supreme Court of Illinois on March 25, 1976.

In their petition for rehearing, Appendix B *infra* p. A-19-21, the petitioners state that, as individual policemen, they are being denied their constitutional rights under the I, V, IX and XIV Amendments of the United States Constitution in that as public employees they are entitled to be governed on the basis of competency and merit and entitled to hearings based upon written charges relating to suspension and discharge before impartial Boards of Fire and Police Commissioners.

As the Court asserted in *Saunders v. Cahill*, F. Supp. 79 (1973) on page 83:

> "It is well settled that an individual, in assuming public employment, retains all the rights and protections otherwise afforded him by the United States Constitution. *Orr v. Thorpe*, 427 F.2d 1129 (5th Cir. 1970); *Pred v. Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969). One of these constitutionally protected rights is that of freedom from arbitrary and unreasonable conduct on the part of the government."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Illinois.

Respectfully submitted,

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APPENDIX A

OPINION
SUPREME COURT
OF ILLINOIS

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the*

twelfth *day of* January *in the year of our Lord, one thousand nine hundred and*

seventy-six *, within and for the State of Illinois.*

PRESENT: DANIEL P. WARD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER — JUSTICE ROBERT C. UNDERWOOD

JUSTICE THOMAS E. KLUCZYNSKI — JUSTICE JOSEPH H. GOLDENHERSH

JUSTICE HOWARD C. RYAN — JUSTICE CASWELL J. CREES

WILLIAM J. SCOTT, ATTORNEY GENERAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, *that afterwards, to-wit, on the* 26th *day of* January *, 19* 76

the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

James Stryker, et al.,

Appellants

No. 47635 vs.

The Village of Oak Park, Illinois, et al.,

Appellees

Appeal from Circuit Court Cook County

CLELL L. WOODS
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS

Docket No. 47635—Agenda 26—September, 1975.

JAMES STRYKER *et al.*, *Appellants*,

v.

THE VILLAGE OF OAK PARK et al., *Appellees*.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiffs, James Stryker and Walter Woitovich, police officers of the Village of Oak Park, filed this action in the circuit court of Cook County against defendants, the Village of Oak Park and its Board of Fire and Police Commissioners, seeking a declaratory judgment that certain ordinances of the defendant village were invalid, and for other relief. The circuit court allowed defendants' motion for judgment on the pleadings and dismissed the cause with prejudice. Plaintiffs appealed. We allowed their motion filed pursuant to Rule 302(b) that the appeal be taken directly to this court.

Prior to April 1974, the defendant village of Oak Park (hereafter defendant), in accordance with the provisions of division 2.1 of article 10 of the Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 10-2.1-1 *et seq.*), had created a Board of Fire and Police Commissioners. On April 15, 1974, the Board of Trustees of the defendant amended chapter 36 of the Village Code to provide:

"*Sec. 36.1 Composition; Office of Policeman Created; Residency.*

The Police Department of the Village of Oak Park is hereby created and established. It shall consist of a chief of police, three (3) deputy chiefs of police and such other officers and personnel as shall be determined by the President and Board of Trustees in the annual Appropriation Ordinance. The position of captain in the Police Department is

eliminated effective at such time as the incumbents, as of January 1, 1974, no longer hold that position.

Police officers appointed after October 1, 1973, shall not be required to comply with the residency requirements of Article 3-14-1 of the Illinois Municipal Code during the probationary period of one year plus an additional six months. Said police officers must become residents of the Village of Oak Park within said 18 month period."

"*Sec. 36.8 Appointment and Suspension of Members by Board of Fire and Police Commissioners.*

The Village Manager is authorized to appoint, suspend or discharge the chief of police and the three deputy chiefs of police. The power of appointment, discharge or suspension of all other officers of the police department shall be in the board of fire and police commissioners of the village, heretofore created and now acting pursuant to the provisions of the Illinois Municipal Code. In the event the Village Manager discharges the chief of police or a deputy chief of police, said officers shall revert to their permanent ranks, if any, in the police department as established under the Fire and Police Commission Act. A deputy chief of police shall be appointed solely from the officers of the Oak Park Police Department."

On October 15, 1974, article 16 of chapter 2 of the Village Code was amended to provide:

"*Section 2.110—Adoption of State Code.*
Division 2.1 of Article 10 of Chapter 24 of the Illinois Revised Statutes, entitled Board of Fire and Police Commissioners, is adopted by reference, provided that Section 10-2.1-3 of said State Act is not adopted and further provided the provisions of Section 36.8 of this Code shall supersede the provisions of said State Act.

Section 2.111—Qualifications—Oath.
The members of the Board of Fire and Police Commissioners must be residents of the Village of Oak Park and will be considered officers of the Village. The members of the Board of Fire and Police Commissioners shall file an oath of office with the Village Clerk.

No person may serve on the Board of Fire and Police Commissioners who is an officer or precinct captain of any established political party, as defined in the Election Code. No person shall be appointed as a member of the Board of Fire and Police Commissioners who is related, either by blood or marriage, up to the degree of first cousin to any elected official of the Village of Oak Park. This section shall supersede Sec. 10-2.1-3 of said State Act."

Section 10-2.1-3 of the Municipal Code, to which the ordinance referred, enumerated qualifications for a member of the Board of Fire and Police Commissioners similar to those in section 2.111 of defendant's ordinance and in addition provided:

> "The members of the board * * * shall file * * * a fidelity bond in such amount as may be required by the governing body of the municipality.
>
> No person holding a lucrative office under the United States, this state or any political subdivision thereof, or a municipality, shall be a member of the board of fire and police commissioners or the Secretary thereof. * * * No more than 2 members of the board shall belong to the same political party existing in such municipality at the time of such appointments * * *."

Plaintiffs contended in the circuit court, and on appeal, that defendant was not empowered to enact ordinances that were in conflict with section 10-2.1-4 of the Municipal Code, which concerns appointment and certification of officers and members of fire and police departments. Citing *Bovinette v. City of Mascoutah*, 55

Ill.2d 129, they contend further that a police chief may be discharged only in the manner provided in section 10-2.1-17 of the Municipal Code. Citing *Cummings v. Daley*, 58 Ill.2d 1, plaintiffs contend that in altering the composition of the Board of Fire and Police Commissioners, defendant attempted an impermissible "attack upon proper administrative review which administrative review cannot be affected by home rule power." Finally, citing *City of Chicago v. Pollution Control Board*, 59 Ill.2d 484, plaintiffs contend that the ordinances were invalid for the reason that they must, but did not, conform with the minimum standards established by the General Assembly.

It is defendant's position that as a home rule unit it was empowered to enact the challenged ordinances.

Section 6(a) of article VII of the Constitution of 1970 provides:

> "(a) * * * Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs * * *."

Since the adoption of the Constitution of 1970 this court has consistently held that an ordinance enacted by a home rule unit under the grant of power found in section 6(a) supersedes a conflicting statute enacted prior to the effective date of the Constitution. (*Paglini v. Police Board*, 61 Ill.2d 233; *Peters v. City of Springfield*, 57 Ill.2d 142; *People ex rel. Hanrahan v. Beck*, 54 Ill.2d 561; *Kanellos v. County of Cook*, 53 Ill.2d 161.) Under the rationale of those cases we hold that under section 6(a) of article VII defendant was empowered to enact the ordinances.

We consider next the contention that the ordinances failed to conform with minimum statewide standards es-

tablished by the General Assembly. Plaintiffs argue that providing "the best possible police protection" is a matter of statewide concern. Although not articulated in precisely that manner we construe plaintiffs' argument to be that because division 2.1 of article 10 of the Municipal Code is a statute encompassing a matter of statewide interest, section 6(i) of article VII of the 1970 Constitution required that any concurrent action taken by defendant be consistent with its provisions, notwithstanding that the statute was enacted prior to the effective date of the Constitution. They analogize the statutory scheme contained in division 2.1 of article 10 of the Municipal Code with the Environmental Protection Act. (Ill. Rev. Stat. 1973, ch. 111½, par. 1001 *et seq.*) and argue that "guaranteeing each Illinois citizen the best possible police protection is as vital as guaranteeing that same citizen the best possible protection against pollution."

Plaintiffs' contention that the statutory scheme either contemplated or provided for statewide uniformity is refuted by the fact that division 1 of article 10 of the Municipal Code (Civil Service in Cities, ch. 24, par. 10-1-17) permits the exemption from classified service, *inter alia*, of the chief of police and "police officers above the grade of captain." Also the qualifications for the office of civil service commissioner (ch. 24, par. 10-1-1) are not the same as those required for the office of fire and police commissioner (ch. 24, par. 10-2.1-3). Obviously the statutes did not establish a uniform plan which governed statewide the matters with which the challenged ordinances were concerned.

In further support of their position plaintiffs point out that sections 10-2.1-5, 10-2.1-6 and 10-2.1-8 of the Municipal Code have been amended since the effective date of the Constitution and that each now contains the following:

> "This Amendatory Act of 1973 does not apply to any municipality which is a home rule unit."

Plaintiffs argue that the absence of that provision from section 10-2.1-4 and 10-2.1-17 shows that the General Assembly "does not intend to provide home rule units with the power to modify those sections * * *." We do not agree. A statute intended to limit or deny home rule powers must contain an express statement to that effect. *Rozner v. Korshak*, 55 Ill.2d 430.

Concerning plaintiffs' other contentions it suffices to state that *Bovinette v. City of Mascoutah*, 55 Ill.2d 129, presented no issue of the power of a home rule unit and that the changes effected by the amendments created no question similar to that presented in *Cummings v. Daley*, 58 Ill.2d 1.

For the reasons stated the judgment is affirmed.

Judgment affirmed.

MR. JUSTICE CREBS took no part in the consideration or decision of this case.

MR. JUSTICE RYAN, dissenting:

The vital issue in this case is whether the Village has the power as a home rule unit, by the enactment of these ordinances, to supersede the provisions of the Illinois Municipal Code. The broad grant of home rule power is found in section 6(a) of article VII of the Constitution of 1970, which provides:

> "(a) * * * Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs * * *."

Recently, in *Ampersand, Inc. v. Finley* (1975), 61 Ill.2d 537, 540, in interpreting the meaning of this general grant of power we stated:

"The late Professor David C. Baum, counsel to the convention's local government committee, stated that the most general and uncertain limitation upon home rule power is found in the language of the home rule grant itself. 'Section 6(a) of article VII gives a home rule unit authority to exercise only those powers and to perform only those functions pertaining to its government and affairs.' (Baum, A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations, 1972 U. Ill. L.F. 137, 152.) Continuing on page 153, Professor Baum stated: '[T]he question is not whether the "pertaining to . . ." language should limit the home rule grant, but rather how extensive the limitation should be.'

The local government committee, explaining the intended extent of this limitation, stated in its report to the constitutional convention, 'It is clear, however, that the powers of home rule units relate to their own problems, not to those of the state or the nation. * * * Thus the proposed grant of powers to local governments extends only to matters "pertaining to their government and affairs".' 7 Proceedings 1621."

The report of the local government committee of the constitutional convention set out 20 examples of the powers that were and were not intended to be included within the general grant of home rule power. Three examples were given of powers that were not included in this grant by reason of extensive and long-standing State and Federal regulations. (7 Record of Proceedings, Sixth Illinois Constitutional Convention 1652.) In *Ampersand*, we found that the dominant interest which the State has in the administration of justice by virtue of article VI of the Constitution of 1970 precludes this subject from being considered a matter pertaining to the government and affairs of a local government unit. The question we must answer in this case is whether or not

division 2.1 of article 10 of the Illinois Municipal Code is evidence of such a dominant and long-standing State interest as to preclude the Village of Oak Park from adopting the amendments in question under its home rule power.

The basic purpose of division 2.1 of article 10 is to afford reasonably satisfactory protection to employees in municipalities subject to this division and to provide a method by which the personnel of the fire and police departments of such municipalities can be taken out of the realm of political patronage and given tenure which depends on merit in order to encourage applications by and retention of qualified personnel. *Kennedy v. City of Joliet*, 380 Ill. 15; *People ex rel. Cadell v. Board of Fire and Police Commrs.*, 345 Ill. App. 415.

The General Assembly in 1903 first enacted the predecessor to division 2.1. (Laws of 1903, at 97.) Until 1949 municipalities between a stated minimum and maximum population were authorized to adopt its provisions. In 1949 the legislature made it mandatory that in every municipality of more than 15,000, and not more than 250,000 population, "which is not subject to 'An Act to regulate the civil service of cities,' approved March 20, 1895, as amended," a board of fire and police commissioners be appointed. (Laws of 1949, p. 453.) It also provided that cities of not less than 5,000 nor more than 15,000 could elect to come under its provisions. Several amendments have been adopted since 1949 primarily changing the minimum and maximum population figures of cities in which the Act is mandatory. It has continued to retain its correlation with the civil service statute. At the present time division 2.1 applies to all municipalities with a population of at least 5,000 and not more than 250,000 which are not subject to division 1 of article 10 of the Illinois Municipal Code (Civil

Service in Cities) and to every municipality of less than 5,000 which adopts the Act.

Thus for more than 26 years the legislature has required, under either the provisions of the civil service statute or the board of fire and police commissioners statute, that municipalities within the specified population range remove the members of the fire and police departments from the realm of political patronage and provide these officers with an appointment, promotional and discharge scheme based on merit. The legislative activity in this area since 1903 and the fact that since 1949 municipalities within the population range of the Act have had no option as to its applicability demonstrate that this is an area of statewide concern and does not pertain to the government and affairs of the local municipalities. As noted above the local government committee of the Constitutional Convention in explaining home rule authority indicated by its examples that long-standing State regulation of a subject would preclude a home rule unit from legislating in that field. Here not only has the regulation been of long standing, but it has also been exclusive.

We have recently upheld the authority of Cook County as a home rule unit to impose a tax on alcoholic beverages. (*Mulligan v. Dunne* (1975), 61 Ill.2d 544.) We noted in that case that although the Liquor Control Act (Ill. Rev. Stat. 1973, ch. 43, par. 94 *et seq.*) was an extensive regulation of the liquor industry by the State, it in fact recognized local interest in liquor control by allowing local government broad authority to license and control the industry and to even completely prohibit the sale of intoxicating liquors. The statute involved in the present case, by contrast, has not recognized local interest in the area of appointment, promotion and discharge of firemen and policemen and has extensively regulated the exercise of local authority on this subject.

The Village relies on our recent decision in *Peters v. City of Springfield*, 57 Ill.2d 142, which held that a home rule city has the power to alter the mandatory retirement age of policemen and firemen specified in division 1 of article 10 (Civil Service in Cities) of the Illinois Municipal Code. (Ill. Rev. Stat. 1971, ch. 24, par. 10-1-18.) In *Peters*, we observed that there was no uniform statutory retirement age of fire and policemen and pointed out the different provisions in different statutes relating to that subject. The City of Springfield was operating under division 1 of article 10 of the Illinois Municipal Code (Civil Service in Cities). Division 2.1 of article 10 of the Code (Board of Fire and Police Commissioners), which is involved in our case, authorizes the municipality to adopt an ordinance providing for a retirement age of not less than 60 years for policemen and firemen. Thus the ordinance in *Peters* did no more than to adopt the retirement age authorized under division 2.1.

In *Paglini v. Police Board of City of Chicago*, 61 Ill.2d 233, we recently held that a home rule unit has the authority to provide that a hearing officer, not a member of the police board, conduct a hearing on charges against a police officer. The city of Chicago has adopted division 1 of article 10 (Civil Service in Cities). Section 10-1-18.1 of division 1 provides for hearings before the police board or any member thereof appointed by the police board to hear the charges. From a discussion of the history of this section found in *Murphy v. Police Board*, 94 Ill. App. 2d 153, it is apparent that the State has not asserted such a dominant interest in the procedural requirements of a hearing as to prohibit the city from authorizing that the hearings be conducted

before a hearing officer rather than before the police board or a member thereof. The same sentence of the statute that provides for hearings before the board or a member thereof authorizes the police board to establish rules for the conduct of hearings.

The changing of the mandatory retirement age in *Peters*, and the simple procedural change in *Paglini*, are far different from the alterations of the basic structure of the merit selection and retirement provisions relating to policemen and firemen found in the ordinance under consideration in the present case.

Although the legislature by the creation of the Board of Fire and Police Commissioners under division 2.1 of article 10 manifested the desire to create a board independent of and free from political and other influences (see *Mank v. Board of Fire and Police Commissioners*, 7 Ill. App. 3d 478), the amended Village Code destroys much of this independence. Article 16 of chapter 2 of the Village Code removes the statutory requirement that not more than two members of the board shall belong to the same political party, thereby enabling the influence of the dominant political party in the Village to be asserted in the activities of the board without a dissenting voice. The ordinance removes the statutory prohibition against board members holding lucrative positions under a municipality and other public bodies, thus permitting the appointment, as members of the board, of employees of the municipalities. The result raises the distinct possibility that the continued employment and livelihood of the board members could well depend upon conforming their decisions as members of the board to the will of the appointing authority.

Just as devastating to the basic structure of merit appointment and tenure is the provision of section 36.8 of the Village Code which provides for the appointment, suspension and discharge of members of the department. In *Bovinette v. City of Mascoutah*, 55 Ill.2d 129, we held that although a municipality under division 2.1 of article 10 of the Illinois Municipal Code could confer upon the municipal manager the authority to appoint the chiefs of the fire and police departments, the authority to discharge a chief under division 2.1 of article 10 rests in the Board of Fire and Police Commissioners and then only for cause, upon written charges after a hearing.

Section 36.8 of the Village Code authorizes the village manager to appoint, suspend or discharge the chief of police and the three deputy chiefs of police. The ordinance contains no requirement that the removal be for cause or that these officers have a hearing before or after their removal. They thus hold their offices solely at the sufferance of the village manager. As to the appointment and removal of the other officers of the police department, the amended ordinance vests that power in the Board of Fire and Police Commissioners. It is not clear however whether this section of the ordinance has attempted to preserve the merit appointment, promotion and the tenure provisions of division 2.1 of article 10.

The contents of the amendments to the Village Code are not of serious concern. The primary issue is whether a home rule unit has the authority to alter or tamper with the basic foundation of division 2.1 of article 10. If we acknowledge that this is an area pertaining to local government and affairs then we have recognized the raw power in any home rule unit to alter or even abolish all requirements of division 2.1 of article 10. The reform

of merit selection and tenure of firemen and policemen which began in 1903 and which was achieved in 1949 will have been lost to home rule municipalities. Accompanying this may well be the resurrection of patronage appointments, promotions and discharges and the attendant evils. The long-standing activity by the State to abolish such practices and the dominant interest finally achieved by the State in 1949 precludes this matter from being considered as pertaining to local government and affairs. I would hold that the amendments to the ordinances of the Village of Oak Park are void.

APPENDIX B

No. 47635

In the

Supreme Court of Illinois

JAMES STRYKER and WALTER WOITOVICH,

Plaintiffs-Appellants,

vs.

THE VILLAGE OF OAK PARK, ILLINOIS and BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 74 L 6893
Honorable **Arthur L. Dunne,** Judge Presiding

PETITION FOR REHEARING

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
Attorney for Plaintiffs-Appellants

In the
Supreme Court of Illinois

JAMES STRYKER and WALTER WOITOVICH,

Plaintiffs-Appellants,

vs.

THE VILLAGE OF OAK PARK, ILLINOIS and BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 74 L 6893
Honorable **Arthur L. Dunne,** Judge Presiding

PETITION FOR REHEARING

NOW COME James Stryker and Walter Woitovich, by thier attorney, Stanley H. Jakala, and present herewith their petition for rehearing of the above entitled cause and respectfully pray that a rehearing be granted in said cause upon the grounds and for the reasons hereinafter set forth in the petition herewith presented.

/s/ Stanley H. Jakala
Attorney for Plaintiffs-Appellants

May It Please The Court:

In affirming the judgment of the Circuit Court of Cook County on the above entitled cause, the Court states that there is no statutory scheme or state-wide uniformity relating to the issue of providing each Illinois citizen with the best possible police protection in terms of the Fourteenth Amendment of the United States Constitution.

Supporting its position, the majority of the Court cite *Paglini v. Police Board*, 61 Ill. 2d 233; *Peters v. City of Springfield*, 57 Ill. 2d 142; *People ex rel. Hanrahan v. Beck*, 54 Ill. 2d 561; *Kanellos v. County of Cook*, 53 Ill. 2d 161.

Analyzing the aforesaid authorities, in his dissenting opinion in this instance, Justice Ryan graphically differentiates *Peters* and *Paglini* as to their application to *Stryker* with the following quoted language:

> "The changing of the mandatory retirement age in *Peters*, and the simple procedural change in *Paglini*, are far different from the alterations of the basic structure of the merit selection and retirement provisions relating to policemen and firemen found in the ordinance under consideration in the present case."

As to *Hanrahan v. Beck*, and *Kanellos v. County of Cook*, the rationale of those two cases cannot support the legal theory that, under Sec. 6 (a) of Article VII of the 1970 Illinois Constitution, a home rule unit is provided with carte blanche power to enact ordinances that can circumvent state statutes which provide orderliness and protection in governing the citizens of the State of Illinois.

In support of the appellants' contention as to the language in the last stated paragraph of this Petition for Rehearing, the appellants cite *Ampersand, Inc. v. Finley*

(1975) 61 Ill. 2d 537, specifically page 540 which interprets the meaning of home rule power as follows:

> "The late Professor David C. Baum, counsel to the convention's local government committee, stated that the most general and uncertain limitation upon home rule power is found in the language of the home rule grant itself. 'Section 6(a) of article VII gives a home rule unit authority to exercise only those powers and to perform only those functions pertaining to its government and affairs.' (Baum, A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations, 1972 U.Ill.L.F. 137, 152.) Continuing on page 153, Professor Baum stated: '(T)he question is not whether the "pertaining to . . ." language should limit the home rule grant, but rather how extensive the limitation should be.'
>
> The local government committee, explaining the intended extent of this limitation, stated in its report to the constitutional convention, 'It is clear, however, that the powers of home rule units relate to their own problems, not to those of the state or the nation. * * * Thus the proposed grant of powers to local governments extends only to matters "pertaining to their government and affairs".' 7 Proceedings 1621."

At the same time, the majority of the Court asserts that there is no statutory scheme providing for statewide uniformity guarantying each Illinois citizen the best possible police protection under the Fourteenth Amendment of the United States Constitution in that there is no uniformity between the Civil Service Act and the Fire and Police Commissioners Act; specifically the lack of uniformity relates to the exemption of police Captains from Civil Service as distinguished from the Fire and Police Commissioners Act, and different qualities for appointing Civil Service Commissioners as distinguished from appointing members to Boards of Fire and Police Commissions.

To support its position that this lack of uniformity negates a state-wide statutory scheme for uniformity in hiring, promoting and discharging of policemen and selection and composition of members to Boards of Fire and Police Commissions, the majority cite *Peters v. City of Springfield*, 57 Ill. 2d 142 (1974).

However, analytically, the *Peters* decision created uniformity as to retirement age by reducing the retirement age from 63 to 60 as required under the Fire and Police Commissioners Act.

Likewise, as has been pointed out in this Petition for Rehearing, the altering of a retirement age is far different than altering the basic structure of the hiring, promoting and discharging of policemen and the selection and composition of Boards of Fire and Police Commissioners.

As is stated by Justice Ryan on page 5 of his dissenting opinion in this instance, the purpose of the Fire and Police Commissioners Act is:

> "The basic purpose of division 2.1 of article 10 is to afford reasonably satisfactory protection to employees in municipalities subject to this division and to provide a method by which the personnel of the fire and police departments of such municipalities can be taken out of the realm of political patronage and given tenure which depends on merit in order to encourage applications by and retention of qualified personnel. *Kennedy v. City of Joliet*, 380 Ill. 15; *People ex rel. Cadell v. Board of Fire and Police Commissioners*, 345 Ill. App. 415."

Likewise in *Saunders v. Cahill*, 359 F.Supp. 79 (1973) on page 83 the Court asserts:

> "It is well settled that an individual, in assuming public employment, retains all the rights and protections otherwise afforded him by the United States Constitution. *Orr v. Thorpe*, 427 F.2d 1129

(5th Cir. 1970; *Pred v. Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969). One of these constitutionally protected rights is that of freedom from arbitrary and unreasonable conduct on the part of the government."

Consequently the Fire and Police Commissioners Act of the State of Illinois affords policemen uniform protection under the First, Fifth, Ninth and Fourteenth Amendments of the United States Constitution on the basis of the cited *Saunders* case as it relates to their hiring, promoting and discharging.

To protect the constitutional guarantees as stated herein pertaining to the hiring, promoting and discharging of policemen the altering of the selection and composition of Boards of Fire and Police Commissioners contrary to the Fire and Police Commissioners Act of the State of Illinois will be devastating.

As Justice Ryan asserts on page 7 of his dissent, the significance of the Fire and Police Commissioners Act in the selection and composition of Boards of Fire and Police Commissioners is:

> "Although the legislature by the creation of the Board of Fire and Police Commissioners under division 2.1 of article 10 manifested the desire to create a board independent of and free from political and other influences (see *Mank v. Board of Fire and Police Commissioners*, 7 Ill. App. 3d 478), the amended Village Code destroys much of this independence. Article 16 of Chapter 2 of the Village Code removes the statutory requirement that not more than two members of the board shall belong to the same political party, thereby enabling the influence of the dominant political party in the Village to be asserted in the activities of the board without a dissenting voice. The ordinance removes the statutory prohibition against board members holding lucrative positions under a municipality and other public bodies, thus permitting the appointment, as members of the board, of employees of the municipalities. The result raises the distinct possibility that the continued employment and livelihood of the board members could well depend upon conforming their decisions as members of the board to the will of the appointing authority."

In summary, the Fourteenth Amendment of the United States Constitution requires that Illinois citizens be provided with the best possible police protection as presently provided under the Fire and Police Commissioners Act of the State of Illinois and that policemen's rights of employment based upon merit be protected on the basis of the First, Fifth, Ninth and Fourteenth Amendments of the United States Constitution and that the altering of the Fire and Police Commissioners Act will resurrect a patronage system of appointments, promotions and discharges with their attendant evils.

In view of the fact that this Court has overlooked or misapprehended the matters hereinabove pointed out, I urge that a rehearing should be granted and that on such rehearing the judgment of the Circuit Court should be reversed and that the Circuit Court vacate the judgment returned against these plaintiffs, reverse the judgment and enter a judgment for the plaintiffs against the defendants-appellees or, in the alternative, to reverse the judgment and remand with directions to the Circuit Court of Cook County to enter judgment for these plaintiffs, or, in the alternative, to reverse the judgment and remand to the Circuit Court of Cook County for a new trial or for such relief as these plaintiffs may be entitled to on this appeal.

/s/ Stanley H. Jakala
Attorney for Plaintiffs-Appellants

APPENDIX C

47635

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

CLELL L. WOODS
CLERK

TELEPHONE
AREA CODE 217
782-2035

March 25, 1976

Mr. Stanley H. Jakala
Attorney at Law
3219 Maple Avenue
Berwyn, Illinois 60402

No. 47635 - James Stryker, et al., appellants, vs. The Village of Oak Park, Illinois, et al., appellees. Appeal, Circuit Court (Cook).

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX D

No. 47635

In the
Supreme Court of Illinois

JAMES STRYKER and WALTER WOITOVICH,

Plaintiffs-Appellants,

vs.

THE VILLAGE OF OAK PARK, ILLINOIS and BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

On Appeal from the Circuit Court of Cook County, Illinois
Honorable **Arthur L. Dunne**, Judge Presiding

BRIEF OF PLAINTIFFS-APPELLANTS

STANLEY H. JAKALA
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Attorney for Plaintiffs-Appellants

In the
Supreme Court of Illinois

JAMES STRYKER and WALTER WOITOVICH,

Plaintiffs-Appellants,

vs.

THE VILLAGE OF OAK PARK, ILLINOIS and BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

On Appeal from the Circuit Court of Cook County, Illinois
Honorable **Arthur L. Dunne,** Judge Presiding

BRIEF OF PLAINTIFFS-APPELLANTS

NATURE OF THE ACTION AND ISSUE PRESENTED FOR REVIEW

Plaintiffs-appellants filed a Complaint for Declaratory Judgment and Mandamus in the Circuit Court of Cook County, Illinois, praying that the Village of Oak Park ordinances amending the Fire and Police Commissioners Act of the State of Illinois be stricken and not enforced as to promotion of policemen to Deputy Chiefs and appointment of members to the Board of Fire and Police Commissioners of the Village of Oak Park. (C17 through C29)

In response to the aforementioned Complaint for Declaratory Judgment and Mandamus the defendants-appellees filed an answer praying that the plaintiffs' Complaint be dismissed. (C31 through C35)

To the answer of the defendants-appellees the plaintiffs filed a reply. (C37, 38, 39, 40, 41, 42, 43, 45, 46)

Subsequently the plaintiffs-appellants filed a Brief in Support of their Motion for Summary Judgment. (C47 through C54)

At the same time the defendants-appellees filed a Memorandum of Law in Support of their Motion for Summary Judgment. (C56 through C66)

Based upon the respective Motions for Summary Judgment as presented by the parties, the Court entered an order finding in favor of the defendants-appellees. (C68, pgs. 1 through 33)

On June 17, 1975 the Illinois Supreme Court granted plaintiffs-appellants Motion to Transfer and Set for Hearing pursuant to stipulation by defendants-appellees for the disposition of this matter.

In reviewing the pleadings of the plaintiffs and defendants in this matter, the central issue concerns itself with the proposition as to whether the Village of Oak Park under its managerial form of government has the home rule power to amend and modify the Fire and Police Commissioners Act of the State of Illinois with respect to the promotion of police officers, appointment, suspension, or discharge of Chiefs of Police, and selection of members of its Board of Fire and Police Commissioners.

POINTS AND AUTHORITIES

1. That *Kanellos v. Cook County*, 53 Ill. 2d 161 (1972), *People Ex Rel Hanrahan v. Beck*, 54 Ill. 2d 561 (1973) and *Peters v. The City of Springfield*, 57 Ill. 2d 142 (1974) do not provide the Village of Oak Park with a basis for invoking home rule power to enact ordinances affecting the promotional scheme of police officers, appointment, suspension and discharge of police chiefs and selection of members to the Board of Fire and Police Commissioners as required under the Fire and Police Commissioners Act of the State of Illinois.

2. That specifically, relating to *Smith-Hurd Annot. Stat.* Chap. 24, Sec. 10-2.1-4 (appointment of members to police departments) and *Smith-Hurd Annot. Stat.* Chap. 24, Sec. 10-2.1-17 (removal or discharge of police officers) and *Smith-Hurd Annot. Stat.* Chap. 24 Sec. 10-2.1-3 (selection and composition of members to Fire and Police Commission Boards), the State of Illinois legislature purposely omitted the following amendatory language which would enable a home rule unit to affect the aforesaid sections:

> "This amendatory act of 1973 does not apply to any Municipality which is a home rule unit."

3. That current Illinois law supports the plaintiffs-appellants in their argument that the Fire and Police Commissioners Act of the State of Illinois relating to the discharge of police chiefs must be in conformity with *Smith-Hurd Annot. Stat.* Chap. 24, Sec. 10-2.1-17, *Bovinette v. City of Mascoutah*, 55 Ill. 2d, 129 (1973).

4. That altering the composition of a Fire and Police Commission is a direct attack upon proper ad-

ministrative review which administrative review cannot be affected by home rule power, *Cummings v. Daley*, 58 Ill. 2d 1 (1974).

5. That, under the equal protection clause of the Bill of Rights of the State of Illinois as retained by the 1970 Illinois Constitution, *Smith-Hurd Annot. Stat.* Constitution, Art. 1 Sec. 2 Bill of Rights, and under the equal protection clause of the United States Constitution, each Illinois citizen as a citizen of the United States is guaranteed the best possible police protection under the Fire and Police Commissioners Act of Illinois by an orderly scheme of promotions on the basis of competency and merit and discharges on the basis of fair and impartial hearings; guarantying each Illinois citizen the best possible police protection is as vital as guarantying that same citizen the best possible protection against pollution. *City of Chicago v. Pollution Control Board*, 59 Ill. 2d 484 (1974).

STATEMENT OF FACTS

On, or before, April 15, 1974 Police Officers James Stryker and Walter Woitovich were members of the Village of Oak Park Police Department and governed by the Fire and Police Commissioners Act of the State of Illinois. (C17)

On, or before, October 8, 1974 the members of the Oak Park Fire and Police Commission were selected on the basis of the Fire and Police Commissioners Act of the State of Illinois. (C24)

That on April 15, 1974 the Village of Oak Park amended its local ordinance Chapter 36, Section 36.1 by creating the position of Chief of Police, three Deputy Chiefs of Police and such other officers and personnel as determined by the President and Board of Trustees. It further abolished the rank of Captain. (C27)

Amending Chapter 36, Section 36.8 of its local ordinance, it provided that the Village Manager be authorized to appoint, suspend, or discharge a Chief of Police and three Deputy Chiefs of Police. (C27)

On October 8, 1974, the Village of Oak Park amended Chapter 2 of its local ordinance by adding Article 16 relating to the Board of Fire and Police Commissioners by abolishing the state law governing the selection of members of the Fire and Police Commission in that it removed the requirements of not holding a lucrative position in a governmental body and having at least one member of the opposition party on its board. (C28)

Upon the passing of the village ordinance amendments as described herein, the plaintiffs-appellants filed their Complaint for Declaratory Judgment and Mandamus.

ARGUMENT

I.

THAT *KANELLOS v. COOK COUNTY*, 53 ILL. 2D 161 (1972), *PEOPLE EX REL. HANRAHAN v. BECK*, 54 ILL. 2D 561 (1973) AND *PETERS v. THE CITY OF SPRINGFIELD*, 57 ILL. 2D 142 (1974) DO NOT PROVIDE THE VILLAGE OF OAK PARK WITH A BASIS FOR INVOKING HOME RULE POWER TO ENACT ORDINANCES AFFECTING THE PROMOTIONAL SCHEME OF POLICE OFFICERS, APPOINTMENT, SUSPENSION AND DISCHARGE OF POLICE CHIEFS AND SELECTION OF MEMBERS TO THE BOARD OF FIRE AND POLICE COMMISSIONERS AS REQUIRED UNDER THE FIRE AND POLICE COMMISSIONERS ACT OF THE STATE OF ILLINOIS.

In *Kanellos v. Cook County*, 53 Ill. 2d 161 (1972), the Supreme Court of Illinois held that Cook County Board of Commissioners could issue $10,000,000 in general obligation bonds without a prior referendum bond approval from the voters of Cook County.

In reaching its decision in the *Kanellos* case, the Court relied on Sec. 6(a) and 6(j) of Art. VII which in effect states that a County exceeding a population of 25,000 is a home rule unit 6(a) and that a home rule unit does have the power to become indebted 6(j).

In addition the Court in the *Kanellos* case stated that under Art. VII, 6(g) and 6(h), which relate to the power of a home rule unit to tax, such constitutional provision enabled the Cook County Board of Commissioners to pass a resolution authorizing the issuance of $10,000,000 of bonds without a voter referendum as was required by an Illinois statute, Counties Act, Sec. 40, that had preceded the 1970 Constitution.

In effect, the *Kanellos* case holds that it had the authority under the Illinois 1970 Constitution to contravene a state statute on the basis of Art. VII 6(a), 6(j) and 6(h).

That the above interpretation of the Kanellos case is not supported in a strongly worded dissent in *People Ex Rel Hanrahan v. Beck*, 54 Ill. 2d 561 (1973), wherein on page 568, second paragraph, the Honorable Judge Ryan states as follows:

> The duties of which the county clerk of Cook County is divested by the county ordinance in question are statutory in origin and as the majority opinion indicates have been part of the statutory duties of that office since 1887. Section 9 of the transition schedule of the 1970 constitution provides: "All laws * * * not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution." The opinion of the court does not find that the statutory duties of the county clerk which are here in question are contrary to or inconsistent with the provisions of the constitution and I find them not to be. Therefore, the statute conferring the duties, powers and functions upon the county clerk of Cook County remain in effect until repealed by the General Assembly.

In the aforesaid dissent paragraph, Justice Ryan held that the majority decision did not properly apply the home rule concept when it held that a Cook County ordinance transferring certain powers from a Cook County Clerk to an ex officio comptroller was proper.

The majority opinion of the *Hanrahan* case based its authority on Sec. 6(a) of Art. VII of the 1970 Illinois constitution by interpreting that section as permitting the transfer of authority, powers, duties and functions of county officers.

In the *Hanrahan* case the majority stressed the fact that its decision was based not upon the elimination of any county office but merely related to the transfer of powers among county officers, which powers were not derived from the common law or constitutionally delegated to that office.

In response to the majority position of the *Hanrahan* case, Justice Ryan stated that the origin of the duties of the County Clerk were statutory in origin and were preserved by Sec. 9 of the transition schedule of the 1970 Constitituion as observed by him in the following manner:

> The opinion of the court relies on our decision in *Kanellos v. County of Cook*, 53 Ill. 2d 161 (1972), as authority for the proposition that a home-rule county may adopt an ordinance pursuant to its home-rule authority and hereby "supersede a statute antedating the present constitution." *Kanellos* has no application to this case because we there specifically found that the provisions of the statute which we held to have been superseded were inconsistent with the provisions of the constitution of 1970 and thus were not preserved by section 9 of the transition schedule. (53 Ill. 2d at 166-167.) The opinion of the court makes no such finding with regard to the statute conferring the functions in question on the county clerk of Cook County.

Recently in *Peters v. The City of Springfield*, 57 Ill. 2d 142 (1974), the Supreme Court of Illinois enunciated the principles of home rule as expressed in the *Kanellos* and *Hanrahan* cases.

However, when one closely examines the rationale of the *Peters* matter one finds that the Court's application of the *Kanellos* and *Hanrahan* home rule proposition was applied on the factual theory that there was no conflict with existing state statutes relating to a mandatory retirement age.

In the *Peters* case, the City of Springfield created an ordinance that had reduced the mandatory retirement age of its policemen and firemen from 63 years to 60 years.

On page 148 of the *Peters* matter, the Court reached its conclusion on the basis of the following language:

> There is no statutory limit on the mandatory retirement age which a municipality may establish which has not elected to adopt the provisions of division 1 of article 10, or division 2.1 of article 10, and although civil service applies to every fire protection district of which all the members are full time and paid (Ill. Rev. Stat. 1971, ch. 127½, par. 37.01), the civil service provisions applicable to fire protection districts (ch. 127½, par. 37.01 through 37.18) do not set any limit on the mandatory retirement age which the board of trustees of the district may establish. It is apparent that there is not an established statewide civil service system for municipal employees or firemen and, indeed, the 78th General Assembly failed to enact legislation which would have established such a system (Senate Bills 217 and 566, House Bills 345, 348 and 1811).

Based upon the heretofore discussed cases in this brief and their application to this matter, one must analyze the Illinois Fire and Police Commissioners Act with the pertinent sections relating to the amending ordinances of the Village of Oak Park.

Under the Illinois Fire and Police Commissioners Act *Smith-Hurd Annot. Stat.* Chap. 24 Sec. 10-2.1-4 provides that all appointments or promotions from the rank of patrolman through the rank of Captain shall be conducted by the Fire and Police Commission of the given municipality excepting the promotion or appointment of a Chief of Police of a given municipality which retains the power of such appointment.

Via the Illinois Fire and Police Commissioners Act, *Smith-Hurd Annot. Stat.* Chap. 24 Sec. 10-2.1-17, no police officer can be removed or discharged unless such removal or discharge is conducted by the Board of Fire and Police Commission of a given municipality.

As a consequence, when one considers the application of *Kanellos*, *Hanrahan* and *Peters* cases to the pleadings of this matter, one can distinguish *Kanellos* in that *Kanellos* relates to the power of a municipality in incurring debt and providing for taxation in repayment of same as provided specifically under Art. VII Secs. 6(g), 6(h) and 6(j) of the Illinois 1970 Constitution with the result that the home rule unit issuing the $10,000,000 of bonds without a voter referendum was not in conflict with any existing statute, since by special enactment via the Illinois 1970 Constitution, the former referendum state statute was superseded.

As for the *Hanrahan* decision, the majority of the Court's position was that it was not confronted with any question relating to the elimination of a common law or statutory power of origin with the result that the ordinance creating the office of a Cook County Comptroller did not violate Art. VII Sec. 6(i) of the Illinois 1970 Constitution, which provides that a home rule unit may exercise concurrent jurisdiction with state law, since state law was not involved.

In his dissent, Justice Ryan disagreed in that he considered the duties of a Clerk of a County Court statutory in origin and which could not be negated unless they had expired on their own limitations or had been repealed or altered by the Constitution.

Hanrahan has no application to this matter as it pertains to a transfer of duties of a County Clerk's office to a newly created office of Comptroller with both the ma-

jority and minority opinions stating that, in one instance, there is no contravention of any state statute; and, in the other instance, there is a contravention of state statute.

Therefore, the majority opinion of *Hanrahan* is without application; the minority opinion would support the position of the plaintiffs.

As for the application of the *Peters* case, it does not apply, since the reduction of age from 63 to 60 did not violate section 6(i) of Art. VII Illinois Constitution, because, under the Fire and Police Commissioners Act, a retirement age must be 65 or less if so ordained by a given municipality.

Because of this variation of the law as compared with the Civil Service Act requiring retirement at 63 or upwards, the Court contended that there was no contravention of an existing state statute which was all encompassing for mandatory age retirement of firemen and policemen.

II.

THAT SPECIFICALLY, RELATING TO *SMITH-HURD ANNOT. STAT.* CHAP. 24 SEC. 10-2.1-4 (APPOINTMENT OF MEMBERS TO POLICE DEPARTMENTS) AND *SMITH-HURD ANNOT. STAT.* CHAP. 24 SEC. 10-2.1-17 (REMOVAL OR DISCHARGE OF POLICE OFFICERS) AND *SMITH-HURD ANNOT. STAT.* CHAP. 24 SEC. 10-2.1-3 (SELECTION AND COMPOSITION OF MEMBERS TO FIRE AND POLICE COMMISSION BOARDS), THE STATE OF ILLINOIS LEGISLATURE PURPOSELY OMITTED THE FOLLOWING AMENDATORY LANGUAGE WHICH WOULD ENABLE A HOME RULE UNIT TO AFFECT THE AFORESAID SECTIONS: "THIS AMENDATORY ACT OF 1973 DOES NOT APPLY TO ANY MUNICIPALITY WHICH IS A HOME RULE UNIT."

When one examines the *Smith-Hurd Annot. Stat.* in relation to the aforesaid chapter and sections as recently

as the pocket supplement of 1975-76, the amendatory language is absent which strengthens the plaintiffs-appellants position that the state legislature of Illinois does not intend to provide home rule units with the power to modify those sections as it has in terms of Chap. 24 Secs. 10-2.1-5, 10-2.1-6 and 10-2.1-8.

III.

THAT CURRENT ILLINOIS LAW SUPPORTS THE PLAINTIFFS-APPELLANTS IN THEIR ARGUMENT THAT THE FIRE AND POLICE COMMISSIONERS ACT OF THE STATE OF ILLINOIS RELATING TO THE DISCHARGE OF POLICE CHIEFS MUST BE IN CONFORMITY WITH *SMITH-HURD ANNOT. STAT.* CHAP. 24 SEC. 10-2.1-17, *BOVINETTE v. CITY OF MASCOUTAH*, 55 ILL. 2D 129 (1973).

In the *Bovinette* case, the Supreme Court of Illinois stated that the City of Mascoutah with a population in excess of 5,000 and not having adopted the Civil Service Act was subject to the Fire and Police Commissioners Act of Illinois which requires that the discharge of a Police Chief be conducted by a Fire and Police Commission pursuant to *Smith-Hurd Annot. Stat.* Chap. 24 Sec. 10-2.1-17.

The interesting aspect of the *Bovinette* decision is that the Court considered the aforesaid Illinois Fire and Police Commissioners section of the prior paragraph in conjunction with Art. V of the Municipal Code providing for managerial form of municipal government and specifically Sec. 5-3-7 (2) which enabled a Municipal Manager to appoint and remove all directors of departments.

By reviewing both sections, the *Bovinette* Court reached the conclusion that the Fire and Police Commissioners Act of Illinois provided a scheme for promotions and discharges of policemen that could not

be altered and that the power of appointment and removal lay in the Board of Fire and Police Commissioners.

IV.

THAT ALTERING THE COMPOSITION OF A FIRE AND POLICE COMMISSION IS A DIRECT ATTACK UPON PROPER ADMINISTRATIVE REVIEW WHICH ADMINISTRATIVE REVIEW CANNOT BE AFFECTED BY HOME RULE POWER, *CUMMINGS v. DALEY*, 58 ILL. 2D 1 (1974).

Analyzing the *Cummings v. Daley* judicial opinion, the Court stated that a municipal ordinance cannot alter the method of judicial review of administrative agencies and that such an ordinance contravenes Sec. 6 of Art. VII of the Illinois 1970 Constitution.

When amending ordinances provide for the creation of Deputy Chiefs and the appointment of same by a Village Manager with the right to suspend or discharge said officers and creation of a Board of Fire and Police Commissioners who do not have the diversity for purposes of guarantying fair evaluation for promotions and impartial hearings for suspension and discharge, then such amending ordinances vitally affect the concept of administrative review as required by *Smith-Hurd Annot. Stat.* Chap. 24 Sec. 10-2.1-17 and supported by *Bovinette* in conjunction with the heretofore cited *Cummings* case.

V.

THAT, UNDER THE EQUAL PROTECTION CLAUSE OF THE BILL OF RIGHTS OF THE STATE OF ILLINOIS AS RETAINED BY THE 1970 ILLINOIS CONSTITUTION, *SMITH-HURD ANNOT. STAT.* CONSTITUTION, ART. 1 SEC. 2 BILL OF RIGHTS, AND UNDER THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION, EACH ILLINOIS CITIZEN AS A CITIZEN OF THE UNITED STATES IS GUARANTEED THE BEST POSSIBLE POLICE PROTECTION UNDER THE FIRE AND POLICE COMMISSIONERS ACT OF ILLINOIS BY AN ORDERLY SCHEME OF PROMOTIONS ON THE BASIS OF COMPETENCY AND MERIT AND DISCHARGES ON THE BASIS OF FAIR AND IMPARTIAL HEARINGS; GUARANTYING EACH ILLINOIS CITIZEN THE BEST POSSIBLE POLICE PROTECTION IS AS VITAL AS GUARANTYING THAT SAME CITIZEN THE BEST POSSIBLE PROTECTION AGAINST POLLUTION. *CITY OF CHICAGO v. POLLUTION CONTROL BOARD*, 59 ILL. 2D 484 (1974).

In the analysis of the *City of Chicago v. Pollution Control Board*, 59 Ill. 2d 484 (1974) the Court was confronted with a state Environmental Protection Act which provided certain guarantees of enforcement against pollution with the consequence that each Illinois citizen as a citizen of the United States is being equally protected from pollution as is substantiated on page 489 of that opinion as follows:

> We conclude therefore that a local governmental unit may legislate concurrently with the General Assembly on environmental control. However, as expressed by that portion of the constitutional proceedings referred to above such legislation by a local governmental unit must conform with the minimum standards established by the legislature.

It is the contention of the plaintiffs-appellants that, providing the best possible police protection throughout the state, is as vital as protecting that same citizen from pollution; that, the Fire and Police Commissioners Act

of the State of Illinois, provides the best possible police protection through an orderly scheme for promotions on the basis of competency and merit and discharges on the basis of fair and impartial hearings by Fire and Police Commissions composed of selected members as required under the current Fire and Police Commissioners Act of the State of Illinois.

CONCLUSION

WHEREFORE, plaintiffs-appellants, James Stryker and Walter Woitovich, respectfully pray that the Court vacate the judgment returned against the plaintiffs, reverse the judgment and enter a judgment for the plaintiffs-appellants against the defendants-appellees or, in the alternative, to reverse the judgment and remand with directions to the Circuit Court of Cook County to enter judgment for these plaintiffs-appellants, or in the alternative, to reverse the judgment and remand to the Circuit Court of Cook County for a new trial or for such relief as these plaintiffs-appellants may be entitled to on this appeal.

Respectfully submitted,

/s/ Stanley H. Jakala
Attorney for Plaintiffs-Appellants

APPENDIX E

No. 47635

In the
Supreme Court of Illinois

JAMES STRYKER and WALTER WOITOVICH,

Plaintiffs-Appellants,

vs.

THE VILLAGE OF OAK PARK, ILLINOIS and BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

On Appeal from the Circuit Court of Cook County, Illinois
Honorable **Arthur L. Dunne**, Judge Presiding

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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In the
Supreme Court of Illinois

JAMES STRYKER and WALTER WOITOVICH,

Plaintiffs-Appellants,

vs.

THE VILLAGE OF OAK PARK, ILLINOIS and BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

On Appeal from the Circuit Court of Cook County, Illinois
Honorable **Arthur L. Dunne**, Judge Presiding

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Replying to the defendants-appellees' brief, the plaintiffs-appellants shall address themselves to the issue of whether the composition of the Board of Fire and Police Commissioners as altered by the Village of Oak Park ordinance serves the best interest of the community.

According to the defendants-appellees' argument, the sophistication of todays society can obviate the necessity of having a representative of a minority political party be one of the three serving as Fire and Police Commissioners.

To support the defendants-appellees' contention to this effect, they quote on page seven of their brief the Honorable Judge Arthur L. Dunne who asserts that the altered composition of the board is "eminently sensible amendment in light of the situation with respect to primary elections."

However, on page 31 of the report of proceedings, the Honorable Judge Dunne states as follows: "I agree with Mr. Jakala that this is an important case that undoubtedly will be reviewed by my esteemed brothers in the Appellate Court."

Based upon the preceding observation of the Honorable Judge Arthur L. Dunne, one important aspect is that the composition of a Fire and Police Commission Board should conform to existing Illinois law pursuant to *Smith-Hurd Annot. Stat.*, Chap. 24, Sec. 10-2.1-3.

As was eloquently stated by the Illinois Appellate Court in *Mank v. Board of Fire and Police Commissioners*, 7 Ill. App. 3d 478, on page 482, the Court provided the following legal analysis and reasoning for the support of the present Illinois law governing the composition of Fire and Police Commissions of Illinois:

> "Furthermore, the legislative intent of Division 2 of the Municipal Code is to create an independent autonomous Board to review matters coming before it. The members are appointed for three-year terms and more than two members cannot be of the same political party. They may not be related by blood to elected officials in the City. The members are not subject to removal except after hearing upon written charges. The creation of the Board and the giving of the Board the powers that were given it clearly manifests the desire to create an independent Board."

Consequently, the Appellate Court in the *Mank* case clearly supports the plaintiffs-appellants' position that the Village of Oak Park ordinance amending the composition of the Board violates existing Illinois law and should be declared void.

Continuing the analysis of the defendants-appellees' brief that under 6(a) of Article 7 of the Constitution of the State of Illinois, the Village of Oak Park as a home rule village has the power to obviate *Smith-Hurd Annot. Stat.*, Chap. 24, Sec. 10-2.1-17 (removal or discharge of police officers).

Supporting the defendants-appellees' argument in terms of Sec. 6(a) of Article 7 of the Illinois Constitution, the defendants-appellees cite the *Kanelos*, *Hanrahan*, and *Peters* cases.

However, in their analysis of the plaintiffs-appellants' brief of the aforesaid cases, the defendants-appellees do not properly interpret the plaintiffs-appellants' position as to those stated cases.

As the plaintiffs-appellants analyzed the aforementioned cases, they stated that, in the *Kanelos* case, the issuance of $10,000,000 without voter referendum was not in conflict with any existing statute, since by special enactment via the 1970 Illinois Constitution under Secs. 6(g), 6(h), and 6(j), the former referendum state statute was superseded; in *Hanrahan* the majority decision stated that there was no elimination of common law or statutory power which was in conflict with Sec. 6(i) of Article 7 of the Illinois Constitution; in *Peters* the Court held that, since there was no uniform mandatory retirement age in the State of Illinois for firemen and policemen, the Springfield ordinance reducing the retirement age from 63 to 60 did not violate Sec. 6(i) of Article 7 of the Illinois Constitution in that the home

rule power making of the City of Springfield did not contravene a uniform state mandatory retirement age for policemen.

As a consequence, neither *Kanelos*, *Hanrahan*, nor *Peters* can be applied in support of the defendants-appellees' position since neither of those cases contravene any existing state statute.

At the same time, the defendants-appellees cite an abundant amount of legislative history to substantiate the position that the legislative intent was to enable home rule units to have liberality and flexibility in governing themselves.

Reviewing the defendants-appellees' brief in respect to its cited legislative history, they refer to *Clark v. Arlington Heights*, 57 Ill. 2d 50 (1974) wherein the Court held that under the 1970 Constitution of the State of Illinois *Clark* involved the change in the election of officials with the result that a referendum was required under 6(f) of Article 7.

That the *Clark* case and the subsequent remarks of legislators as cited by the defendants-appellees' brief tended to establish the position that home rule units can alter Fire and Police Commissions, appointment of police officers, and discharge of police officers since they do not involve elected officials.

In the previously cited *Mank* case by the plaintiffs-appellants in this Reply Brief, on page 484 of that case, the Court describes Fire and Police Commission Boards as consisting of judicial hearing officers as is verified by the following language from that opinion:

> "We agree that respondent was entitled to be tried before a tribunal that was completely disinterested in the subject matter and that it would

have been appropriate for the commissioner to have disqualified himself.

* * *

It is a classical principle of jurisprudence that no man who has a personal interest in the subject matter of a decision in a case may sit in judgment on that case.

The principle is as applicable to administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact not holding judicial office as it is to those who are technically judges in the full sense of the word."

Because *Mank* identifies Fire and Police Commissions in the same sense as judicial judges hearing matters, then under *Cummings v. Daley*, 50 Ill. 2d, 1 (1974) a home rule unit cannot determine the method of judicial review of decisions of its agencies.

As to the appointment and discharge of police officers, the Court is not restricted to the legislative intent as expressed by John Parkhurst on page 16 of the defendants-appellees' brief.

In fact, in *People ex rel. City of Salem v. McMakin*, 53 Ill. 2d 347 (1972) the majority of the Court held that a home rule unit could adopt provisions of the Act for Industrial Development acquiring properties beyond its corporate limits when the public interest demanded it.

The *City of Salem* case contradicts the position of John Parkhurst who represented to the convention that home rule units would not have extra-territorial powers unless expressly granted by the State Legislature. *Illinois Bar Journal*, Vol. 63, #6, Feb. 1975, pg. 322.

As a result in the *City of Salem* matter the Court did not follow the legislative dictates as expressed by Mr. Parkhurst as the common good of the city required the

acquisition of properties beyond its corporate limits which the Court stated was a power that could be exercised by home rule units whenever a similar common good existed.

Consequently, applying the reasoning of the *City of Salem* under the equal protection clause of the Illinois Constitution and the United States Constitution, the public interest demands that the current state law governing the composition of Fire and Police Commissions, appointment of police officers and discharge of police officers remain intact as they provide the best possible protection for the common good of the State of Illinois.

On pages 17 and 18 of the defendants-appellees' brief an Ohio case is cited to support their position for altering the Fire and Police Commissioners Act in terms of the appointment and discharge of police officers.

In examining the *State v. City of Cleveland*, one finds that the Ohio case does not conflict with current Illinois Civil Service or Fire and Police Commissioners law as to the selection of a police chief; under the Civil Service Act, *Smith-Hurd Annot. Stat.* Chap. 24 Sec. 10-1.17 a municipality has a choice of selecting a police chief; under the Fire and Police Commissioners Act, *Smith-Hurd Annot. Stat.* Chap. 24 Sec. 10-2.1-4 the municipality may reserve the right to appoint its police chief.

As for the discharge of police chiefs the Ohio case is silent and would not contradict existing Illinois case law which requires a police chief be provided with the same type of impartial hearing as any other police officer. *Bovinette v. The City of Mascouth*, 55 Ill. 2d 29 (1973).

Based upon the arguments presented by the plaintiffs-appellants in this Reply Brief as to Argument I as ad-

vanced by the defendants-appellees in their brief, the position of the defendants-appellees is not supported for the purpose of altering the composition of Fire and Police Commissions, appointment of policemen, and discharge of policemen.

Analyzing Argument II of the defendants-appellees' brief, the cited case of *Rozner v. Korshak* does not support their position that the following amendatory language is meaningless:

> "This Amendatory Act of 1973 does not apply to any municipality which is a home rule unit."

It is significant that this language has been applied to *Smith-Hurd Annot. Stat.* Chap. 24 Secs. 10-2.1-5, 10-2.1-6, and 10-2.1-8, but not to Chap. 24 Sec. 10-2.1-3 selection and composition of members to Fire and Police Commission Boards, Chap. 24 Sec. 10-2.1-4, appointment of members to police departments; Chap. 24 Sec. 10-2.1-17 removal of police officers.

The importance of the home rule amendatory language is verified by the *Rozner* opinion on page 392 and is stated as follows:

> "The kind of inadvertent restriction of the authority of home rule units for which the plaintiff contends can be avoided if statutes that are intended to limit or deny home-rule powers contain an express statement to that effect."

Likewise the following language is quoted from page 328 of the *Illinois Bar Journal* February 1975 Vol 63 #6:

> "It seems likely that with a subjective 'restrictive purpose' test, rather than a mechanical labeling test, legislation with a potential impact on home rule units will continue to receive amendments clarifying that it does not apply to or is not a limit on the powers of home rule municipalities or counties. These amendments, in whatever form or whenever added are generally called the 'home rule amendment'."

Because of the above quoted language, Sec. 10-2.1-3, 10-2.1-4 and 10-2.1-17 have not been amended and certainly could have been amended since the adoption of the Illinois Constitution of 1970. The absence of such language strengthens the plaintiffs-appellants' position that the composition of Fire and Police Commissions, appointment of police officers and discharge of police officers be governed by existing state law.

As to Argument III as advanced by the defendants-appellees' brief relating to *Bovinette*, the significance of *Bovinette* is that it supports and strengthens *Smith-Hurd Annot. Stat.* Chap. 24 Sec. 10-2.1-17 by guarantying a fair and impartial hearing to police chiefs.

Although *Bovinette* concerns itself with a non-home rule unit, nevertheless the absence of the amendatory home rule language as to Sec. 10-2.1-17 confirms the plaintiffs-appellants' position that *Bovinette* should apply to such a home rule unit as Oak Park.

As to Argument IV as presented by the defendants-appellees' brief, the altering of the Fire and Police Commission Board of Oak Park is a direct attack upon administrative review from the standpoint of the heretofore analysis of the *Mank* case which considers the present state law governing composition of Fire and Police Commissions for providing the best and impartial hearing situation that is required under administrative review.

There can be no analogy between the reduction of the retirement age from 63 to 60 as in *Peters* and the alter-

ing of the Board of Fire and Police Commissioners that would tend to destroy a fair and impartial administrative review hearing for police officers as presently provided under Secs. 10-2.1-4 and 10-2.1-17.

Lastly, the analysis of Argument V of the defendants-appellees' brief does not weaken the plaintiffs-appellants' position that, under the equal protection clause of the Illinois Constitution and the United States Constitution, each Illinois citizen is guaranteed the best possible protection as presently provided by state law.

On page 21 of their brief, the defendants-appellees cite the *Peters* case as stating that Civil Service is not a matter of great statewide concern because of lack of uniformity in certain Civil Service requirements.

But in reply the plaintiffs-appellants maintain that the *Peters* decision resulted because of a lack of uniformity in mandatory retirement age requirements as between the Civil Service Act and the Fire and Police Commission Act.

From that standpoint there may not have been a statewide concern; but the age requirement was not reduced to less than 60, which is significant, in that both under Civil Service and Fire and Police Commission Act, there is a uniformity that the mandatory age requirement can not be less than 60.

However, the *Peters* case does not assert that the uniformity as expressed for the selection of Fire and Police Commissioners, appointment of police officers and discharge of police officers under the Fire and Police Commission Act has no statewide concern.

Further, the defendants-appellees argue that they are being arbitrarily discriminated in that it is a municipality governed by Division II which prevents it from

chosing police officers above the rank of Captain as provided by Division I.

In reply the plaintiffs-appellants state that the Village of Oak Park chose to be governed by Division II and therefore is subject to the Fire and Police Commission Act of the State of Illinois.

Citing the *Salem* case does not strengthen the defendants-appellees' argument in that *Salem* represents the legal theory that a home rule unit can enact corporate powers affecting the acquisition of land beyond its corporate limits provided the "public purpose concept" requires it.

In *Salem* the public purpose was to provide additional employment for a ravaged economic area in Illinois; in the *City of Chicago v. Pollution Control Board*, the public purpose required the state to govern against pollution; in the absence of the amendatory language enabling home rule units to act in terms of the composition of Fire and Police Commission Boards, appointment of police officers, and discharge of police officers, in the analysis of the *Mank* and *Cummings* cases in the interpretation and application of *Kanelos*, *Hanrahan* and *Peters* the public purpose concept requires the best possible police protection as guaranteed under the equal protection clause of the 1970 Illinois Constitution and the United States Constitution as provided by the existing Fire and Police Commission Act Secs. 10-2.1-3, 10-2.1-4 and 10-2.1-17.

That the concept of public good and public purpose should not be obviated by the conclusion as expressed in the defendants-appellees' brief; the concept of home rule should not destroy basic rights and guaranties of the public and policemen as our society today is in need of

the best possible police protection as it is in need of the best possible control against pollution and economic disaster.

CONCLUSION

WHEREFORE, plaintiffs-appellants, James Stryker and Walter Woitovich, respectfully pray that the Court vacate the judgment returned against the plaintiffs, reverse the judgment and enter a judgment for the plaintiffs-appellants against the defendants-appellees or, in the alternative, to reverse the judgment and remand with directions to the Circuit Court of Cook County to enter judgment for these plaintiffs-appellants, or in the alternative, to reverse the judgment and remand to the Circuit Court of Cook County for a new trial or for such relief as these plaintiffs-appellants may be entitled to on this appeal.

Respectfully submitted,

/s/ Stanley H. Jakala
Attorney for Plaintiffs-Appellants

APPENDIX F

§ 10-2.1-3. Qualifications—Oath—Bond—Removal

The members of the board shall be considered officers of the municipality, and shall file an oath and a fidelity bond in such amount as may be required by the governing body of the municipality.

No person holding a lucrative office under the United States, this state or any political subdivision thereof, or a municipality, shall be a member of the board of fire and police commissioners or the Secretary thereof. The acceptance of any such lucrative office by a member of the board shall be treated as a resignation of his office as a member of the board or the Secretary thereof. No person shall be appointed a member of the board of fire and police commissioners who is related, either by blood or marriage up to the degree of first cousin, to any elected official of such municipality. No more than 2 members of the board shall belong to the same political party existing in such municipality at the time of such appointments and as defined in Section 10-2 of The Election Code. If only one or no political party exists in such municipality at the time of such appointments, then state or national political party affiliations shall be considered in making such appointments. Party affiliation shall be determined by affidavit of the person appointed as a member of the board.

Members shall not be subject to removal, except for cause, upon written charges, and after an opportunity to be heard within 30 days in his or their own defense, before a regular meeting of the governing body of the municipality for which they have been appointed. A majority vote of the elected members of such governing body shall be required to remove any such member from office. 1961, May 29, Laws 1961, p. 576, § 10-2.1-3, added 1965, Aug. 10, Laws 1965, p. 2840, § 1.

§ 10-2.1-4. Fire and police departments—Appointment of members—Certificates of appointments.

The board of fire and police commissioners shall appoint all officers and members of the fire and police departments of the municipality, including the chief of police and the chief of the fire department, unless the council or board of trustees shall by ordinance as to them otherwise provide; except that in any municipality which adopts or has adopted this Division 2.1 and also adopts or has adopted Article 5 of this Code, the chief of police and the chief of the fire department shall be appointed by the municipal manager, if it is provided by ordinance in such municipality that such chiefs, or either of them, shall not be appointed by the board of fire and police commissioners.

If a member of the department is appointed Chief of Police or Chief of the Fire Department prior to being eligible to retire on pension he shall be considered as on furlough from the rank he held immediately prior to his appointment as chief. If he resigns as Chief or is discharged as Chief prior to attaining eligibility to retire on pension, he shall revert to and be established in such prior rank, and thereafter be entitled to all the benefits and emoluments of such prior rank, without regard as to whether a vacancy then exists in such rank.

All appointments to each department other than that of the lowest rank, however, shall be from the rank next below that to which the appointment is made except that the chief of police and the chief of the fire department may be appointed from among members of the police and fire departments, respectively, regardless of rank, unless the council or board of trustees shall have by ordinance as to them otherwise provided.

The sole authority to issue certificates of appointment shall be vested in the Board of Fire and Police Commissioners and all certificates of appointments issued to any officer or member of the fire or police department of a municipality shall be signed by the chairman and

secretary respectively of the board of fire and police commissioners of such municipality, upon appointment of such officer or member of the fire and police department of such municipality by action of the board of fire and police commissioners.

The term "policemen" as used in this Division does not include auxiliary policemen as provided for in this Code.

Any full time member of a regular fire or police department of any municipality which comes under the provisions of this Division or adopts this Division 2.1 or which has adopted any of the prior Acts pertaining to fire and police commissioners, is a city officer.
1961, May 29, Laws 1961, p. 576, § 10-2.1-4, added 1965, Aug. 10, Laws 1965, p. 2840, § 1, as amended 1968, Aug. 17, Laws 1968, p. 76, § 1, eff. Aug. 17, 1968.

§ 10-2.1-17. Removal or discharge—Investigation of charges—Retirement

Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. The board of fire and police commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof, which hearing may be continued from time to time. In case an officer or member is found guilty, the board may discharge him, or may suspend him not exceeding 30 days without pay. The board may suspend any officer or member pending the hearing with or without pay, but not to exceed 30 days. If the Board of Fire and Police Commissioners determines that the charges are not sustained, the officer or member shall be reimbursed for all wages withheld, if any. In the conduct of this hearing, each member of the board shall have power to administer oaths and affirmations, and the board shall have power to secure by its subpoena both the attendance and testimony of witnesses and the production of books and papers relevant to the hearing.

The age for retirement of policemen or firemen in the service of any municipality which adopts this Division 2.1 is 65 years, unless the Council or Board of Trustees shall by ordinance provide for an earlier retirement age of not less than 60 years.

The provisions of the "Administrative Review Act", approved May 8, 1945, and all amendments and modifications thereof, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board of fire and police commissioners hereunder. The term "administrative decision" is defined as in Section 1 of said "Administrative Review Act."

Nothing in this section shall be construed to prevent the chief of the fire department or the chief of the police department from suspending without pay a member of his department for a period of not more than 5 days, but he shall notify the board in writing of such suspension. Any policeman or fireman so suspended may appeal to the board of fire and police commissioners for a review of the suspension within 24 hours after such suspension, and upon such appeal, the board may sustain the action of the chief of the department, may reverse it with instructions that the man receive his pay for the period involved, or may suspend the officer for an additional period of not more than thirty days or discharge him, depending upon the facts presented. 1961, May 29, Laws 1961, p. 576, § 10-2.1-17, added 1965, Aug. 10, Laws 1965. p. 2840, § 1. Amended by P.A. 76-1525, § 1, eff. Sept. 22, 1969.
